No. 3320

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FRANK ALIOTO et al.,
Appellants,

vs.

L. A. PEDERSEN,
Appellee.

APPELLANTS' REPLY BRIEF.

H. W. HUTTON,
Proctor for Appellants.

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The matters urged on page 2 of appellee's brief might be taken advantage of on special exceptions, not on general. The libel states a cause of action.

What appears on page 3 is met by the mere statement that, if appellee had the right to put appellants on a limit of 1200 salmon per day, it was conditional on his first complying with those terms of the contract inserted to give appellants fair earnings; but it does not appear on the face of the libel that he had that right.

If appellee had the right to put appellants on a limit of 1200 salmon per day, the day must be measured by an ordinary day's working time of 8 hours.

Paragraph V, of libel (page 7 of Transcript), shows appellants were on duty 24 hours and, under the theory applied in this case, they were entitled at least to a credit of 3600 salmon instead of 1200.

Stennick v. Jones, 252 Fed. 345, cited on page 6 of appellee's brief, says:

> "and it is the duty of the court, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

Damages based on a catch of fish are certainly of the most uncertain character, that is shown on the face of the contract as:

Not knowing whether appellants would be on or off the limit the language is based on off the limit and there is inserted:

> "The same rule to apply when boats are on the limit."

Now, in the nature of things, being unable to ascertain how many salmon could or would be caught during a period of detention, the basis of computation, the only one that could be used, was, What was in the boats when detention commenced? That might have been 200 or 2400, depending on whether fishing was good or bad.

An analysis of the percentages shows that they were intended to mean, and do mean, actual compensation for lost time, which of course eliminates any idea of a penalty.

For instance if a boat offered 1200 or any other number of salmon for delivery it would take exactly

nine (9) hours' detention (about an ordinary day's work) for the percentages to equal the number offered. If detained longer, common justice dictates that the men should be paid for the time.

If a boat off the limit, however, offered 200 salmon it would take twenty-nine (29) hours' detention for the percentages to equal 1200. The employer, however, would pay for 1200 for 24 hours' detention.

If the decision appealed from is correct, though, a boat offering 2400 salmon after 24 hours' detention would lose 800 in delivery and receive no percentages for detention, that could not have been the intention.

We are of the opinion that the construction given by the lower court to the words *at least* 1200 should be paid for each 24 hours, is, that *not more* than 1200 should be paid for in that time, the decision being that a man cannot earn pay for more than 1200 salmon in 24 hours no matter how many hours of the 24 he works. But who could have told in May, 1918, or even on July 4, 1918, what the actual damages in this case would be? Not being able to tell in advance they must be deemed liquidated.

The contract was made by parties presumably familiar with the business, was evidently carefully studied and signed before a United States official.

The damages are less than would be allowed in any other calling as follows:

Eight hours is an ordinary working day. To prevent men from being called upon to work in excess

of the capacity of the human frame, extra work is always made expensive by charging and allowing in occupations, such as this, double time. In this contract for the first six hours (¾ of a day) the

Allowance is 25%
For the 7th and 8th hours (25% each)..... 50%

Total for an ordinary working day..... 75%

For the next 16 hours 25% each hour or.....400%

Exactly double time for two working days of eight hours each, so appellants, for the 24 hours' detention in any calling, would be entitled to one full day and two double days or five days' pay. Under this contract they get four and three-quarter days' pay. Of course the amount in dollars seems large; but it must be remembered that libelants had to go to Alaska to catch fish, and also return after they were caught. The only opportunity of making fair earnings depended on the days' salmon run in Alaska—usually about 29 in a service of a little over five months duration.

If the contract had read $5.00 per hour it would have been an arbitrary amount. In this case, however, the attempt was and the parties did use probable earnings based on what had already been earned. No other method was open to them.

If appellee had detained appellants fifteen minutes less than six hours about two-thirds of a day would have been lost to appellants and appellee would have paid nothing for it. He ought not to

complain of the percentages if he voluntarily, or by his own act, increased them by increasing the number of hours detention.

We think, however, that the six hours was inserted to enable appellee to take the salmon in the event that all of the appellants should offer at the same time. It does not indicate a penalty.

We submit the damages were of a most uncertain character and agreed upon in advance after an evident careful consideration and computation, and there is no evidence of a penalty apparent on the face of the language. It is clearly otherwise and is purely compensatory.

Dated, San Francisco,
June 2, 1919.

Respectfully submitted,

H. W. Hutton,
Proctor for Appellants.